Kang Juntao v Menteri Dalam Negeri, Malaysia & Anor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO WA-44–191–08 OF 2019
AHMAD SHAHRIR JC
16 MARCH 2020

Criminal Procedure — Habeas corpus — Application for — Applicant was wanted by government of United States of America ('US') — Warrant of arrest issued by US court — Sessions court judge allowed public prosecutor's application for applicant to be committed to prison pending applicant's extradition to US — Applicant applied for writ of habeas corpus — Whether conditions under s 20 of the Extradition Act 1992 complied with — Whether warrant for committal properly issued — Extradition Act 1992 ss 4, 6 & 20

The applicant was a leader in a turtle trafficking syndicate. The applicant was wanted by the government of United States of America ('the US Government') for trial at the US District Court of New Jersey with one count of laundering of monetary instrument in contravention of s 1956(a)(2)(A) of Title 18, United States Code and aiding and abetting the laundering of monetary instruments in contravention of s 2 of Title 18, United States Code. Pursuant to the request from the US Government to the Government of Malaysia for the provisional arrest of the applicant, the applicant was arrested on 23 January 2019 on his arrival at the Kuala Lumpur International Airport. The request was made under the auspices of the agreement and the exchange of notes dated 3 August 1995 between Malaysia and the US for the extradition of offenders. On 24 January 2019, the learned magistrate ordered that the applicant be remanded in custody for 60 days under the Extradition Act 1992 ('the Act'). Subsequently, a warrant for the arrest of the applicant was issued by the US magistrate judge for the indictment of the applicant. The case was then transferred to the sessions court. On 22 July 2019, the learned sessions court judge allowed the application by the public prosecutor vide a notice of application ('exh KJT1') for the applicant to be committed to prison pending the applicant's extradition to the US. In response, the applicant filed the present application for the issuance of a writ of habeas corpus for the immediate release of the applicant. The issues arose were: (a) whether there was a direction under s 4 of the Act by the Ministers of Home Affairs — s 20(1) of the Act; (b) whether there were supporting documents produced in relation to the offence — s 20(1)(b) of the Act; (c) whether the alleged act of the applicant would constitute an offence under the laws of Malaysia if it had taken place in Malaysia — s 20(1)(c) of the Act ('dual criminality'); and (d) whether the applicant had provided substantial grounds to satisfy the court to believe in the existence of the circumstances in sub-paras (i)–(v) of s 20(1)(d) of the Act.

Held, dismissing the application:

(1) The applicant was alleged to have committed the offence of laundering of monetary instruments in the US under s 1956(a)(2)(A) of Title 18, United States Code. The alleged act of the applicant would definitely constitute an offence under s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 if it had taken place in Malaysia, satisfying the element of dual criminality under s 20(1)(c) of the Act. Further, the offence which the applicant was alleged to have committed in the US was an extradition offence because upon conviction, it was punishable in the US with imprisonment for not less than one year and if committed in Malaysia, it was punishable too with imprisonment for not less than one year (see s 6(2)(a) and (2)(b) of the Act) (see paras 14, 27 & 31).

(2) Any arrangement made between Malaysia and any country for the extradition of fugitive criminals may be made under the Act if the order of the Minister of Home Affairs pursuant to s 2 of the Act was published in the *gazette*. The agreement and exchange of notes dated 3 August 1995 between Malaysia and the US in respect of the arrangement for the extradition of offenders was published in the *gazette* as the Extradition (United States) Order 1997 vide PU(A) 213/1997 and came into force on 2 June 1997. The warrant for committal was issued by the learned sessions court judge on 22 July 2019. Clearly, the Act was applicable in the present application (see paras 15–16).

(3) The procedure under s 20 of the Act for issuance of a warrant for committal may only be resorted to if there was a direction given by the Minister of Home Affairs under s 4 of the Act. Where the Minister of Home Affairs gives such a direction, the prima facie requirement to commit a fugitive criminal to prison pending his surrender shall be dispensed with. In the present case, exh LJV11 was the direction of the Minister of Home Affairs dated 19 March 2019 under s 4 of the Act directing for the procedures under s 20 to be applied in relation to the extradition request for the applicant from the US government. Based on the above exhibit, the court found that the Minister of Home Affairs had given his direction accordingly under s 4 of the Act (see paras 18 & 21).

(4) The court held that, the warrant of arrest, the affidavit affirmed by the trial attorney in the Environmental Crimes Section of the US Department of Justice, the affidavit affirmed by the Special Agent of the US Fish and Wildlife Service and the certificate dated 22 February 2019 signed by the Associate Director, Office of International Affairs, Criminal Division, Department of Justice, Washington DC were 'supporting documents' within the meaning of s 20(3) of the Act and that

they had been produced before the learned sessions court judge when she heard the application for the issuance of the warrant for committal (see para 23).

(5) The court was satisfied that the learned sessions court judge had properly considered the affidavits filed by the applicant in finding that the applicant had not brought himself within any of the circumstances under s 20(1)(d) of the Act. Similarly, in the present application too, the applicant had not avail himself of the same. In the circumstances, the applicant had not satisfied the court to believe in the existence of the circumstances in sub-paras (i)–(v) of s 20(1)(d) of the Act. Therefore, there was no impropriety in the grant of the warrant for committal by the learned sessions court judge (see paras 35–36).

[Bahasa Malaysia summary

Pemohon adalah peneraju sindiket pemerdagangan penyu. Pemohon dikehendaki oleh kerajaan Amerika Syarikat ('Kerajaan AS') untuk perbicaraan di Mahkamah Daerah New Jersey AS dengan satu tuduhan pengubahan instrumen kewangan yang bertentangan dengan s 1956(a)(2)(A) Title 18, United States Code dan membantu dan bersubahat dengan pengubahan instrumen kewangan yang bertentangan dengan s 2 Title 18, United States Code. Berdasarkan permintaan kerajaan AS kepada kerajaan Malaysia untuk penangkapan sementara pemohon, pemohon ditangkap pada 23 Januari 2019 semasa tiba di Lapangan Terbang Antarabangsa Kuala Lumpur. Permintaan tersebut dibuat di bawah naungan perjanjian dan pertukaran nota bertarikh 3 Ogos 1995 antara Malaysia dan AS untuk ekstradisi pesalah. Pada 24 Januari 2019, majistret yang bijaksana memerintahkan agar pemohon direman dalam tahanan selama 60 hari di bawah Akta Ekstradisi 1992 ('Akta'). Setelah itu, waran untuk penangkapan pemohon dikeluarkan oleh majistret AS untuk dakwaan ke atas pemohon. Kes tersebut kemudian dipindahkan ke mahkamah sesyen. Pada 22 Julai 2019, hakim mahkamah sesyen membenarkan permohonan pendakwa raya melalui notis permohonan ('eksh KJT1') agar pemohon dikomitkan ke penjara sementara menunggu ekstradisi pemohon ke AS. Sebagai tindak balas, pemohon memfailkan permohonan ini untuk perintah writ habeas corpus untuk pembebasan segera pemohon. Isu-isu yang timbul adalah: (a) sama ada terdapat arahan di bawah s 4 Akta oleh Menteri Dalam Negeri — s 20(1) Akta; (b) sama ada terdapat dokumen sokongan yang dikemukakan berkaitan dengan kesalahan — s 20(1)(b) Akta; (c) sama ada tindakan pemohon yang dinyatakan akan menjadi suatu kesalahan di bawah undang-undang Malaysia sekiranya ia berlaku di Malaysia — s 20(1)(c) Akta ('jenayah berganda'); dan (d) sama ada pemohon telah memberikan alasan yang mencukupi untuk memuaskan mahkamah untuk mempercayai adanya keadaan dalam sub-perenggan (i)–(v) s 20(1)(d) Akta.

Diputuskan, menolak permohonan:

(1) Pemohon didakwa melakukan kesalahan pengubahan instrumen kewangan di AS di bawah s 1956(a)(2)(A) Title 18, United States Code. Tindakan yang didakwa dilakukan oleh pemohon pasti akan menjadi kesalahan di bawah s 4(1)(a) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001 sekiranya ia berlaku di Malaysia, memenuhi unsur jenayah berganda di bawah s 20(1)(c) Akta. Tambahan lagi, kesalahan yang didakwa dilakukan oleh pemohon di AS adalah kesalahan ekstradisi kerana jika disabitkan, ia boleh dihukum di AS dengan hukuman penjara tidak kurang dari satu tahun dan jika dilakukan di Malaysia, ia juga boleh dihukum penjara tidak kurang dari satu tahun (lihat s 6(2)(a) dan (2)(b) Akta) (lihat perenggan 14, 27 & 31).

(2) Segala pengaturan yang dibuat antara Malaysia dan mana-mana negara untuk mengekstradisi penjenayah yang diburu boleh dibuat di bawah Akta tersebut jika perintah Menteri Dalam Negeri menurut s 2 Akta tersebut diterbitkan dalam *warta*. Perjanjian dan pertukaran nota bertarikh 3 Ogos 1995 antara Malaysia dan AS berkenaan dengan pengaturan ekstradisi pesalah telah diterbitkan dalam *warta* sebagai Perintah Ekstradisi (Amerika Syarikat) 1997 melalui PU(A) 213/1997 dan berkuat kuasa pada 2 Jun 1997. Waran untuk pengkomitan dikeluarkan oleh hakim mahkamah sesyen yang bijaksana pada 22 Julai 2019. Oleh itu, adalah jelas Akta tersebut terpakai dalam permohonan semasa (lihat perenggan 15–16).

(3) Prosedur di bawah s 20 Akta untuk mengeluarkan waran pengkomitan hanya dapat dilakukan jika terdapat arahan yang diberikan oleh Menteri Dalam Negeri di bawah s 4 Akta. Apabila Menteri Dalam Negeri memberikan arahan tersebut, syarat prima facie untuk mengkomitkan penjenayah buruan ke penjara sementara menunggu penyerahannya akan dikecualikan. Dalam kes ini, exh LJV11 adalah arahan Menteri Dalam Negeri bertarikh 19 Mac 2019 di bawah s 4 Akta yang mengarahkan agar prosedur di bawah s 20 diguna pakai berkaitan dengan permintaan ekstradisi pemohon oleh kerajaan AS. Berdasarkan ekshibit di atas, mahkamah mendapati bahawa Menteri Dalam Negeri telah memberikan arahannya dengan sewajarnya di bawah s 4 Akta tersebut (lihat perenggan 18 & 21).

(4) Mahkamah memutuskan bahawa, waran tangkap, afidavit yang disahkan oleh Peguam Perbicaraan di Bahagian Jenayah Alam Sekitar di Jabatan Kehakiman AS, afidavit yang disahkan oleh Ejen Khas Perkhidmatan Ikan dan Hidupan Liar AS dan perakuan bertarikh 22 Februari 2019 yang ditandatangani oleh Pengarah Bersekutu, Pejabat Hal Ehwal Antarabangsa, Bahagian Jenayah, Jabatan Kehakiman, Washington DC adalah 'dokumen sokongan' dalam maksud s 20(3) Akta tersebut dan dokumen tersebut telah dikemukakan di hadapan hakim mahkamah

sesyen yang bijaksana ketika beliau mendengar permohonan perintah waran pengkomitan (lihat perenggan 23).

(5) Mahkamah berpuas hati bahawa hakim mahkamah sesyen yang bijaksana telah mempertimbangkan dengan tepat afidavit yang difailkan oleh pemohon dalam membuat dapatan bahawa pemohon tidak membuktikan bahawa keadaannya termasuk di dalam mana-mana keadaan di bawah s 20(1)(d) Akta. Begitu juga, dalam permohonan ini, pemohon tidak membuktikan perkara tersebut. Dalam keadaan tersebut, pemohon gagal untuk memuaskan hati mahkamah untuk mempercayai adanya keadaan dalam sub-perenggan (i)–(v) s 20(1)(d) Akta. Oleh itu, tidak terdapat ketidakaturan dalam pemberian waran pengkomitan oleh hakim mahkamah sesyen yang bijaksana (lihat perenggan 35–36).]

Cases referred to

Kerajaan Malaysia & Ors v Nasharuddin Nasir [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399; [2003] 6 AMR 497, FC (refd)

L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] supp MLJ 393; [2010] 7 CLJ 653; [2010] 2 MLRA 182; [2011] 1 AMR 109, FC (refd)

Menteri Dalam Negeri, Malaysia & Anor v Seyed Ramin Paknejad [2017] 4 MLJ 303; [2017] 4 CLJ 541; [2017] 5 MLRA 202; [2017] 3 AMR 368, FC (refd)

Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613; [2005] 2 MLRA 231; [2006] 2 AMR 193, FC (refd)

United States v Kang Juntao Case N 19–107 (JBS) (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3, 4(1)(a), Second Schedule

Extradition (United States) Order 1997

Extradition Act 1992 ss 2, 2(1), 4, 5, 6, 6(2)(a), (2)(b), 12(3), 13(1)(b), 16(1), (2), 18, 19, 20, 20(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (3)

International Trade in Endangered Species Act 2008 s 10, Third Schedule

Title 18, United States Code [USA] ss 2, 1956(a)(2)(A)

James Ee Kah (Fuk Lee Ewe Kiang with him) (KF Ee & Co) for the applicant.
Faizul Aswad bin Masri (Suloshani Vijendran with him) (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Ahmad Shahrir JC:

INTRODUCTION

[1] This is an application for the issuance of a writ of habeas corpus for the immediate release of the applicant. The applicant is a citizen of the People's Republic of China. Pursuant to the request on 15 January 2019 from the government of the United States of America ('US') to the Government of Malaysia for the provisional arrest of the applicant, the applicant was arrested on 23 January 2019 on his arrival at the Kuala Lumpur International Airport. The request by the US government was made under the auspices of the agreement and the exchange of notes dated 3 August 1995 between Malaysia and the US for the extradition of offenders ('extradition treaty').

[2] On 24 January 2019, the learned magistrate ordered that the applicant be remanded in custody for 60 days under the Extradition Act 1992. On 22 March 2019, the learned magistrate allowed the application by the public prosecutor for the applicant's case to be transferred to the sessions court. On 22 July 2019, the learned sessions court judge allowed the application by the public prosecutor for the applicant to be committed to prison pending the applicant's extradition to the US. On 1 August 2019, the applicant filed the present application.

BRIEF MATRIX OF FACTS

[3] The applicant is wanted by the US government for trial at the US District Court of New Jersey with one count of laundering of monetary instrument in contravention of s 1956(a)(2)(A) of Title 18, United States Code and aiding and abetting the laundering of monetary instruments in contravention of s 2 of Title 18, United States Code. On 15 January 2019, the US government issued a request to the Government of Malaysia for the provisional arrest of the applicant. The request was made pursuant to the extradition treaty. A warrant for the arrest of the applicant was eventually issued on 13 February 2019 by the Honourable Joel Schneider, the US Magistrate Judge of the District Court of New Jersey for the indictment of the applicant in the case of *United States v Kang Juntao* Case N 19–107 (JBS).

[4] Investigations revealed that the applicant is a leader in a turtle trafficking syndicate. The applicant recruited turtle poachers in the US and pay them directly or through middlemen in the US. The turtles will then be shipped from the US to Hong Kong and China and resold in the black market. The trade of these turtles without the necessary permit is prohibited under the Convention on International Trade in Endangered Species of Wild Fauna and Flora ('CITES') which is codified in the US under the Endangered Species Act.

[5] Pursuant to the request for the provisional arrest, the public prosecutor made an application to the magistrate under s 13(1)(b) of the Extradition Act 1992 for the provisional apprehension of the applicant. On 17 January 2019, the magistrate issued a warrant for the provisional arrest of the applicant. The applicant arrived at the Kuala Lumpur International Airport on 23 January 2019 and the warrant of arrest was successfully executed.

[6] On 24 January 2019, the applicant was brought before the magistrate and pursuant to s 16(1) of the Extradition Act 1992, the magistrate issued an order for the applicant to be remanded in custody for the period of 60 days from the date the applicant was arrested. On 22 February 2019, the US government applied to the Government of Malaysia through diplomatic cable to extradite the applicant to the US to face a charge for laundering of monetary instrument in violation of Title 18, United States Code, ss 1956(a)(2)(A) and 2. On 19 March 2019, the first respondent issued an order under s 12(3) of the Extradition Act 1992 to signify that such a requisition has been made. Pursuant to s 4 of the Extradition Act 1992, the first respondent also gave a direction in writing for the procedure under s 20 of the Extradition Act 1992 to be applied.

[7] On 22 March 2019, the magistrate made an order pursuant to s 16(2) of the Extradition Act 1992 for the case to be transmitted to the sessions court and for the applicant to be continued remanded until his appearance before the sessions court. On 2 April 2019, the public prosecutor filed an application for the applicant to be committed to prison to await the order of the first respondent for the applicant to be surrendered to the US government. On 22 July 2019, the sessions court judge allowed the application and issued a warrant for the applicant to be committed to prison pending the order of the first respondent for the applicant to be surrendered.

THE APPLICATION

[8] The applicant filed the present application on 1 August 2019. In the application, the applicant prays for the following reliefs:

(a) that the applicant be brought before the court on a date to be fixed and for the applicant to be released without any conditions; and

(b) for any further and other orders as this honourable court deems fit and proper.

The affidavits filed for and against the application are as follows:

(i) 'Afidavit Sokongan' affirmed on 1 August 2019 by Kang Juntao (encl 2), the applicant;

(ii) 'Afidavit Jawapan' affirmed on 5 September 2019 by Wan Nor Sakina bt Saad (encl 6) for the respondents;

(iii) 'Afidavit Jawapan 2' affirmed on 12 September 2019 by Rosoman bin Abu Bakar @ Che Din (encl 7) for the respondents; and

(iv) 'Afidavit Balasan Pemohon' affirmed on 26 September 2019 by Kang Juntao (encl 8), the applicant,

and since the heart of the challenge by the applicant relate to the propriety of the warrant for committal, it is essential for this court to have the benefit of the grounds of judgment of the learned sessions court judge. For that purpose, I have directed the learned counsel for the applicant to obtain and file in the grounds of judgment in an affidavit. In that regard, the following affidavit was filed:

(e) 'Afidavit Tambahan Peguam Ee Kah Fuk' affirmed on 13.11.2019 by Ee Kah Fuk (Enclosure 26), the counsel for the applicant.

BRIEF DELIBERATIONS

Contention of the applicant

[9] The contention of the applicant in support of the application may be summarised as follows:

(a) in order for the applicant to be extraditable to the US (the requesting state), the offence alleged by the requesting state to have been committed by the applicant must have been committed in the requesting state. In the present case, the applicant has never set foot in the US and as such, it is not possible for the applicant to commit the alleged offence within the territory of the US;

(b) the offence alleged to have been committed by the applicant has no extraterritorial effect under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA'). Since the AMLATFPUAA does not have extraterritorial effect, there is no element of dual-criminality and it follows that the proviso to s 6(2)(b) of the Extradition Act 1992 had not been fulfilled;

(c) even if the offence alleged to have been committed by the applicant has extraterritorial effect under Malaysian law, the offence alleged to have been committed by the applicant is a matter between the People's Republic of China and the US and has nothing to do with Malaysia as the applicant is not a citizen or permanent resident of Malaysia;

(d) even if the offence alleged to have been committed by the applicant in the US has a corresponding criminality under s 4(1)(a) of the AMLATFPUAA, the predicate offence, which is required to be proved

before an offence under s 4(1)(a) of the AMLATFPUAA may be said to have been proved, is absent; and

(e) although pursuant to s 4 of the Extradition Act 1992 the Minister of Home Affairs had given a direction in writing for the prima facie requirement to be dispensed with and for the procedure under s 20 of the Extradition Act 1992 to apply, that does not absolve the requesting state from submitting the required information under s 20 of the Extradition Act 1992 to show a probable cause. The affidavit affirmed on 13 February 2019 by Ryan Bessey, Special Agent of the US Fish and Wildlife Service in support of the extradition request contains bare averments and is not sufficient to implicate the applicant with the alleged offence.

Contention of the respondents

[10] In response to the arguments of the applicant, the submissions of the learned DPP may be briefly stated as follows:

(a) in an application for the issuance of the writ of habeas corpus, it is for this court to be satisfied that the detention of the applicant is without just cause. In the present application, the detention of the applicant was made under a warrant for committal dated 22 July 2019. As such, the onus lies on the applicant to show that his detention is not in accordance with the law; and

(b) the Extradition Act 1992 is applicable to the extradition treaty pursuant to the order made by the first respondent under s 2(1) of the Extradition Act 1992 which was published in the *Gazette* vide PU (A) 213/1997. As a result of the order, the procedures under s 20 of the Extradition Act 1992 become applicable instead of the requirement of prima facie case in an application to commit a fugitive criminal, such as the applicant, to prison pending the order of the Minister of Home Affairs for his surrender. In the circumstances, the warrant for committal had been properly and validly issued against the applicant by the learned sessions court judge.

ANALYSIS AND DECISION

[11] In an application for the issuance of a writ of habeas corpus, the function of the courts has been described in a number of well-established authorities. In the case of *Kerajaan Malaysia & Ors v Nasharuddin Nasir* [2003] MLJU 841; [2004] 1 CLJ 81; [2003] 2 MLRA 399; [2003] 6 AMR 497, the Federal Court made the following observations in that regard:

> It is trite law that the remedy of *habeas corpus* is intended to facilitate the release of persons actually detained in unlawful custody. It is the fact of detention which gives

the court its jurisdiction (See: *Barnardo v Ford* [1892] AC 326). The observation made by Choor Singh J in *Re Onkar Shrian* [1970] 1 MLJ 28; [1969] 1 LNS 155 is particularly instructive). He said:

> Where the personal freedom of an individual is wrongly interfered with by another, the release of the former from illegal detention may be effected by habeas corpus. The illegal detention of a subject, that is a detention or imprisonment which is incapable of legal justification, is the basis of jurisdiction in habeas corpus..

[12] It is trite that the challenge must be directed against the current detention order although the earlier or initial arrest may be irregular (see *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613; [2005] 2 MLRA 231; [2006] 2 AMR 193 and *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] supp MLJ 393; [2010] 7 CLJ 653; [2010] 2 MLRA 182; [2011] 1 AMR 109).

[13] The legal basis for the extradition of fugitive criminals is contained in the Extradition Act 1992. The term 'fugitive criminal' is defined in s 5 of the Extradition Act 1992.

Section 5 of the Extradition Act 1992 reads as follows:

> 5 Interpretation
>
> In this Act, unless the context otherwise requires —
>
> 'fugitive criminal' means any person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country and is, or is suspected to be, in some part of Malaysia;

[14] The applicant is a person accused of an extradition offence committed in the US. For reasons which will discussed in the later part of this judgment relating to the issue of dual criminality, the offence which the applicant is alleged to have committed in the US is an extradition offence because upon conviction, it is punishable in the US with imprisonment for not less than one year and if committed in Malaysia, it is punishable too with imprisonment for not less than one year (see: s 6(2)(a) and (b) of the Extradition Act 1992).

[15] Any arrangement made between Malaysia and any country for the extradition of fugitive criminals may be made under the Extradition Act 1992 if the order of the Minister of Home Affairs pursuant to s 2 of the Extradition Act 1992 is published in the *Gazette*.

Section 2 of the Extradition Act 1992 provides as follows:

> 2 Order of the Minister

(1) Where a binding arrangement has been entered into between Malaysia and any country for the extradition of fugitive criminals, the Minister may, by order to be published in the *Gazette* reciting or embodying the terms of such arrangement, direct that the provisions of this Act shall apply to that country subject to any restriction, exception, modification, adaptation, condition or qualification contained in the order.

(2) Where any arrangement referred to in this section is revoked or lapses, the Minister shall, by order published in the *Gazette*, forthwith certify that fact; and any such order shall be conclusive evidence that the arrangement referred to therein has been revoked or has lapsed, as the case may be, and shall not be questioned in any legal proceedings whatsoever.

(3) Any order made under this section shall be laid before each House of Parliament as soon as may be after it is made.

(4) An order made under this section shall be conclusive evidence that the arrangement therein referred to complies with the provisions of this Act, and that this Act applies in the case of the country mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatsoever.

[16] The agreement and exchange of notes dated 3 August 1995 between Malaysia and the US in respect of the arrangement for the extradition of offenders is published in the *Gazette* as the Extradition (United States) Order 1997 vide PU(A) 213/1997 and came into force on 2 June 1997. The warrant for committal was issued by the learned sessions court on 22 July 2019. Clearly, the Extradition Act 1992 applies in the present application.

[17] A sessions court is empowered under s 18 of the Extradition Act 1992 to inquire into extradition matters brought before it in accordance with the specified procedures. Where an application is made to commit a fugitive criminal to prison pending the order of the Minister of Home Affairs for his surrender, it may be made under ss 19 or 20 of the Extradition Act 1992. In an application made under s 19 of the Extradition Act 1992, the sessions court is under a duty to consider whether a prima facie case has been made out in support of the requisition of the country concerned before committing the fugitive criminal to prison. However, the requirement of making out a prima facie is dispensed with if the application is made under s 20 of the Extradition Act 1992.

[18] The procedure under s 20 of the Extradition Act 1992 for issuance of a warrant for committal may only be resorted to if there is a direction given by the Minister of Home Affairs under s 4 of the Extradition Act 1992. Where the Minister of Home Affairs gives such a direction, the prima facie requirement to commit a fugitive criminal to prison pending his surrender shall be dispensed with.

Section 4 of the Extradition Act 1992 provides as follows:

4 Direction of the Minister to apply procedure in section 20

Where the binding arrangement which has been entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the prima facie requirement to be dispensed with either generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in section 20 shall apply to such cases.

Propriety of the warrant for committal

[19] In issuing the warrant for committal on 22 July 2019, the learned sessions court judge exercised her powers under s 20 of the Extradition Act 1992. In order to determine whether the stipulated conditions have been satisfied and by necessary extension, whether the warrant for committal has been properly issued, it is necessary to examine the reasons advanced by the public prosecutor when making the application for the warrant for committal and the grounds provided by the applicant in resisting the application. Paragraphs (a), (b), (c) and (e) of s 20(1) of the Extradition Act provide for the conditions to be satisfied for the issuance of the warrant whereas the applicant is put under a duty to satisfy the court of the circumstances under sub-paras (i)–(v) of s 20(1)(d) in order to resist the application.

[20] The warrant for committal dated 22 July 2019 was issued by the learned sessions court judge based on the notice of application dated 2 April 2019 ('application for warrant for committal') filed by the public prosecutor at the Kuala Lumpur Sessions Court. The respective affidavits filed for and against this application were as follows:

(a) the 'Afidavit Sokongan' affirmed on 2 April 2019 by Lim Ju Vynn ('affidavit of Lim Ju Vynn') in support of the application;

(b) the 'Afidavit Balasan' affirmed on 15 April 2019 by the applicant ('affidavit of KJT') in opposing the application;

(c) the 'Afidavit Jawapan' affirmed on 3 May 2019 by Wan Nor Sakina bt Saad ('Affidavit of Wan Nor Sakina') in support of the application;

(d) the 'Afidavit Jawapan II' affirmed on 14 May 2019 by Inspektor Mohamed Shamir bin Mohd Ridzam Deva ('affidavit of Inspector Mohamed Shamir') in support of the application; and

(e) the 'Afidavit Balasan II' affirmed on 17 May 2019 by the applicant ('affidavit of KJT 2') in opposing the application.

Whether there is a direction under s 4 by the Minister of Home Affairs — s 20(1)

[21] A perusal of the affidavit of KJT shows that the direction of the Minister of Home Affairs was contained in exh 'KJT1'. Exhibit 'KJT1' was the notice of application dated 2 April 2019 filed at the Kuala Lumpur Sessions Court by the public prosecutor in its application for the applicant to be committed to prison pending his surrender. This notice of application was supported by the Affidavit of Lim Ju Vynn and the direction of the Minister of Home Affairs was annexed as exh 'LJV11' in that affidavit. Exhibit 'LJV11' was the direction of the Minister of Home Affairs dated 19 March 2019 under s 4 of the Extradition Act 1992 directing for the procedures under s 20 to be applied in relation to the extradition request for the applicant from the US government. I find that the Minister of Home Affairs had thus given his direction accordingly under s 4 of the Extradition Act 1992.

Whether there are supporting documents produced in relation to the offence — s 20(1)(b)

[22] For the purposes of s 20(1)(b) of the Extradition Act 1992, s 20(3) defines what supporting documents are.

Section 20(3) of the Extradition Act 1992 provides as follows:

> 20 Procedure before Sessions Court where a special direction has been given under section 4
>
> (3) In this section, 'supporting documents' means —
>
> (a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;
>
> (b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out;
>
> (c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence.

[23] A perusal of the affidavit of KJT shows as follows:

(a) the warrant of arrest for the applicant was contained in exh 'KJT1'. Exhibit 'KJT1' was the notice of application filed by the public prosecutor for the applicant to be committed to prison pending his surrender. This notice of application was supported by the affidavit of Lim Ju Vynn and the warrant of arrest was annexed as exh 'LJV9' in that

affidavit. Exhibit 'LJV9' was the warrant for the arrest of the applicant dated 13 February 2019 issued by the Honourable Joel Schneider, the US Magistrate Judge of the District Court of New Jersey for the indictment of the applicant in the case of *United States v Kang Juntao* Case No 19–107 (JBS);

(b) the statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence were contained in exh 'KJT1'. Exhibit 'KJT1' was the notice of application filed by the public prosecutor for the applicant to be committed to prison pending his surrender. This notice of application was supported by the affidavit of Lim Ju Vynn and the respective statements were annexed as exhs 'LJV5' and 'LJV6', respectively in that affidavit. They are in the manner of the affidavit affirmed on 13 February 2019 by Ryan C Connors (exh 'LJV5'), the trial attorney in the Environmental Crimes Section of the US Department of Justice and the affidavit affirmed on 13 February 2019 by Ryan Bessey (exh 'LJV6'), the Special Agent of the US Fish and Wildlife Service; and

(c) the authentication was provided by means of a certificate dated 22 February 2019 signed by Jeffrey M Olson, the Associate Director, Office of International Affairs, Criminal Division, Department of Justice, Washington DC. This certificate was annexed as exh 'LJV4' in the affidavit of Lim Ju Vynn and is found in the notice of application filed by the public prosecutor.

In the circumstances, I find that exhs 'LJV1', 'LJV5', 'LJV6' and 'LJV4' are 'supporting documents' within the meaning of s 20(3) of the Extradition Act 1992 and that they have been produced before the learned sessions court judge when she heard the application for the issuance of the warrant for committal.

Dual Criminality — Whether the alleged act of the applicant would constitute an offence under the laws of Malaysia if it had taken place in Malaysia — s 20(1)(c)

[24] In the case of *Menteri Dalam Negeri, Malaysia & Anor v Seyed Ramin Paknejad* [2017] 4 MLJ 303; [2017] 4 CLJ 541; [2017] 5 MLRA 202; [2017] 3 AMR 368, it was held by the Federal Court that 'the rule of dual or double criminality in extradition law is that requirement that to be an extraditable offence the act constituting the offence must be an offence in both the requesting and requested States and must have been committed in the territory of the requesting state'. The rule of dual criminality is incorporated under s 6 of the Extradition Act 1992.

Section 6 of the Extradition Act 1992 reads as follows:

> 6 Extradition offence
>
> (1) A fugitive criminal shall only be returned for an extradition offence.
>
> (2) For the purposes of this Act, an extradition offence is an offence, however described, including fiscal offences —
>
> (a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and
>
> (b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:
>
> Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.
>
> (3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2).

[25] As a matter of observation, it is pertinent to note at this juncture that the offence alleged to have been committed by the applicant in the US is an extradition offence and not an extraterritorial offence. To that end, the issue regarding the extraterritoriality of the offence alleged to have been committed by the applicant does not arise.

[26] The circumstances relating to the offences alleged to have been committed by the applicant pursuant to the indictment before the US District Court under the federal law of the US was annexed as exh 1 in the affidavit affirmed on 13 February 2019 by Ryan C Connors (exh 'LJV5'), the trial attorney in the Environmental Crimes Section of the US Department of Justice. Exhibit 1 is as follows:

> INDICTMENT
>
> COUNT ONE
>
> (Laundering of Monetary Instruments)
>
> The Grand Jury in and for the District of New Jersey, sitting at Camden, charges:
>
> 1. KANG JUNTAO is also known as Kan Jundao.
>
> 2. At all times relevant to this Indictment, defendant KANG JUNTAO was a citizen of the People's Republic of China ('China') residing in Hangzhou City, China.
>
> *Applicable Law*
>
> 3. The United States, China, Malaysia, Hong Kong special administrative region ('Hong Kong'), and approximately 180 other countries are signatories to a

multilateral treaty called the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249 (commonly referred to as 'CITES'). A

4. The purpose of CITES is to monitor and regulate the trade of and to protect fauna and flora from commercial activities that might diminish the capability of any species to survive in the wild. CITES classifies wildlife, fish, and plants in three appendices (Appendix I, II and III). International trade in species listed in these Appendices is monitored and regulated by permits and quotas. The permit restrictions apply to live and dead specimens, as well as the skins, parts, and products made in whole or in part from a listed species. Wildlife and plant species listed in Appendix I of CITES are those currently threatened with extinction and that are or may be further threatened by trade. Under Appendix I of CITES, a species may be exported from a country only if, prior to exportation, the exporter applies for and obtains a valid foreign import permit issued by the country of import and a valid export permit issued by the country of export. Wildlife and plant species listed in Appendix II of CITES include species that are not presently threatened with extinction but may become so if their trade is not regulated. Under Appendix II of CITES, a species may be exported from a country only if, prior to exportation, the exporter applies for and obtains a valid CITES export permit issued by the country of export. B C D

5. Many species of turtles and tortoises are listed in Appendix II, but some have greater protection and are listed in Appendix I. Species listed in Appendix I and II of CITES are prohibited from export by Title 50, Code of Federal Regulations, Section 23.13(a), which states: E

> Except as provided in § 23.92, it is unlawful for any person subject to the jurisdiction of the United States to conduct any of the following activities unless they meet the requirements of this part: Import, export, re-export, or engage in international trade with any specimen of a species listed in Appendix I, II or III of CITES. F

The exporter is required to provide all pertinent information as well as submit Federal Fish and Wildlife Application Form 3-200-32, 3-200-33, 3-200-36, and/or 3-200-74. G

6. CITES is implemented in the United States by the Endangered Species Act of 1973 (the 'ESA'), which directs the U.S. Fish and Wildlife Service ('USFWS') to administer the treaty. 16 U.S.C. §§ 1537a, 1540(f). The ESA makes it unlawful to knowingly 'trade in any specimen contrary to the provisions of [CITES], or to possess any specimen traded contrary to the provisions of [CITES].' 16 U.S.C. §§ 1538(c)(1), 1540(b)(1). 'Trade,' in this context, includes the sale and export from the United States. The USFWS has issued regulations incorporating the specific permit requirements and provisions of CITES and listing the species contained on the CITES appendices. 50 C.F.R. Part 23. H I

7. The eastern box turtle (*Terrapene Carolina Carolina*), the Florida box turtle (*Terrapene Carolina Bauri*) and the Gulf Coast box turtle (*Terrapene Carolina Major*) are subspecies of the common box turtle (*Terrapene Carolina*) and have been listed in CITES Appendix II since 1995. The spotted turtle (*Clemmys Guttata*) is a

semi-aquatic turtle listed in CITES Appendix II as of 2013. The wood turtle (*Glyptemys Insculpta*) has been protected under CITES Appendix II since 1992.

8. In addition to the requirements of CITES and the ESA, federal law generally requires that all wildlife, including turtles, or parts thereof, be declared to the USFWS prior to their export from the United States. When exporting any wildlife, exporters or their agents must file with the USFWS, a completed Declaration for Importation or Exportation of Fish, Wildlife, or Plants (Form 3-177). A USFWS of United States Customs Service officer must clear (or refuse) wildlife being exported from the United States, and the exporter or his agent must make available to the officer the wildlife being exported, as well as all required permits, licenses or other documents. 50 C.F.R. § 14.

9. United States law prohibits the transfer of funds from outside the United States to the United States with the intent to promote a specified unlawful activity. 18 U.S.C. § 1956(a)(2). Smuggling goods from the United States, 18 U.S.C. § 554, is a specified unlawful activity. 18 U.S.C. § 1956(c)(7). There is extraterritorial jurisdiction over this conduct by a non-United States citizen of the conduct occurs in part in the United States and the series of transactions involves funds exceeding $10,000. 18 U.S.C. § 1956(f).

Money Laundering

10. Person One is a special agent working in an undercover capacity in Atlantic County, New Jersey. As described below, KANG JUNTAO sent Person One and other individuals a series of financial transactions for the purchase, shipping, and smuggling of turtles from the United States to Hong Kong.

11. Person One maintained a PayPal account for all transactions with KANG JUNTAO. PayPal is a digital money transfer platform located in the United States. Person One opened a BB & T bank business checking account in New Jersey to maintain the undercover funds listed below. This BB & T bank account is linked to the undercover PayPal account used to transact with KANG JUNTAO.

12. KANG JUNTAO arranged for turtle suppliers to send Person One eastern box turtles, Florida box turtles, Gulf Coast box turtles, spotted turtles, and wood turtles, which were in turn smuggled to Hong Kong. In total, between on or about June 12, 2017, and December 3, 2018, KANG JUNTAO sent Person One 40 payments amounting to approximately $78,362 through PayPal. Person One used these funds to, among other things, pay turtle suppliers at KANG JUNTAO's direction. Thirty-eight of the payments sent by KANG JUNTAO correspond to an address in China, twenty-nine of which are associated with China Union Pay Bank, a financial institution in China, or China credit card accounts.

13. Neither KANG JUNTAO nor his associates ever applied for or ever received the necessary CITES permits to export protected species. None of the turtle shipments were declared to USFWS or customs authorities. In total, KANG JUNTAO directed Person One and other shippers to smuggle approximately 1,500 turtles out of the United States to China, valued at approximately $2,250,000.

14. From on or around June 12, 2017, through on or around December 3, 2018, in Atlantic County, in the District of New Jersey and elsewhere, defendant KANG

JUNTAO transported, transmitted, and transferred a monetary instrument and funds in excess of $10,000 to a place in the United States, specifically New Jersey, from and through a place outside the United States, specifically China, with the intent to promote the carrying on of specified unlawful activity, to wit Smuggling Goods from the United States (Title 18, United States Code, Section 554), and did aid and abet other persons in doing so; all in violation of Title 18, United States Code, Sections 1956(a)(2)(A) and 2.

15. KANG JUNTAO sent Person One the following PayPal payments to promote turtle smuggling from New Jersey to China:

Date	Value		Date	Value
June 12, 2017	$1,000		Feb 16, 2018	$2,500, $4,000 & $250
June 17, 2017	$800		March 8, 2018	$1,400
June 24, 2017	$3,432		April 17, 2018	$1,800
July 7, 2017	$472		April 26, 2018	$600
July 9, 2017	$4,000		April 27, 2018	$1,000
July 21, 2017	$1,248		May 6, 2018	$412 & $618
July 25, 2017	$3,500 & $3,000		June 1, 2018	$2,060
August 16, 2017	$1,000		June 6, 2018	$2,266
August 18, 2017	$4,160		July 13, 2018	$2,472
August 28, 2017	$4,160		August 16, 2018	$4,326
Sept, 7, 2017	$4,000 & $3,000		August 24, 2018	$1,236
Sept 26, 2017	$1,000		Sept 11, 2018	$2,000 & $ 1,500
October 17, 2017	$1,000 & $200		October 12, 2018	$2,000 & $500
November 8, 2017	$2,450		October 26, 2018	$2,400
November 16, 2017	$2,000		Dec, 3, 2018	$600
December 8, 2017	$2,000			
January 18, 2018	$2,000		Total	$78,362

A TRUE BILL

FOREPERSON

JEAN WILLIAMS

Deputy Assistant Attorney General

Environment and Natural Resources Division

By:

SGD.

RYAN CONNORS

Trial Attorney.

[27] The applicant is alleged to have committed the offence of laundering of monetary instruments in the US under 18 USC § 1956(a)(2)(A). Upon conviction, it provides for a sentence of fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both.

The provision of 18 USC § 1956(a)(2)(A) reads as follows:

> 18 United States Code § 1956 — Laundering of Monetary Instruments
>
> (a)(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States —
>
> (A) with the intent to promote the carrying on of *specified unlawful activity*; or
>
> (B) knowingly that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part —
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

The words 'specified unlawful activity' in sub-para (A) of the 18 USC § 1956(a)(2) is defined under 18 USC § 1956(c)(7) as an act which includes smuggling of goods from the US.

[28] In relation to the offence of laundering of monetary instruments under the laws of the US, the equivalent law in Malaysia is s 4(1)(a) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ('the AMLATFPUAA'). Pursuant to s 3 of the AMLATFPUAA, the words 'unlawful activity' in s 4(1)(a) of the AMLATFPUAA means the commission of a serious offence and under s 3 of the AMLATFPUAA, the words 'serious offence' means any of the offences specified in the Second Schedule.

[29] The offence of importing and exporting of any scheduled species without a permit is provided for under s 10 of the International Trade in Endangered Species Act 2008 ('the ITESA') and this offence is one of the offences specified in the Second Schedule of the AMLATFPUAA. The words 'scheduled species' in turn is defined as any animal or plant specified in the Third Schedule of the ITESA and the types of turtles in relation to the offence alleged to have been committed by the applicant in the US are included in the Third Schedule.

[30] Upon conviction, s 4(1)(a) of the AMLATFPUAA provides for a penalty of imprisonment for a term not exceeding fifteen years and the court may also impose a fine of not less than five times the sum or value of the proceeds of the unlawful activity or instrumentalities of the offence at the time the offence was committed or five million ringgit, whichever is the higher.

[31] Based on these reasons, I find that the alleged act of the applicant would definitely constitute an offence under s 4(1)(a) of the AMLATFPUAA if it had taken place in Malaysia, satisfying the element of dual criminality under s 20(1)(c) of the Extradition Act 1992.

Whether the applicant had provided substantial grounds to satisfy the court to believe in the existence of the circumstances in sub-paras (i)–(v) of s 20(1)(d)

[32] In the present application, the applicant filed two affidavits. One (encl 2) is in support of his application and the other (encl 8) is in response to the affidavits filed for and on behalf of the respondents. The other affidavit (encl 26) is only for the purpose of exhibiting the grounds of judgment of the learned sessions court judge in allowing the application of the public prosecutor for the issuance of the warrant for committal.

[33] In the two affidavits, the averments relate to, among others, the following matters:

(a) the applicant's initial arrest was invalid and unlawful for the following reasons:

(i) the grounds and allegations of facts relied on in the application for the warrant for committal did not fall under the subject matter and scope of the Extradition Act 1992; and

(ii) the warrant for committal is against the Federal Constitution,

(b) the warrant of arrest dated 13 February 2019 issued by the Honourable Joel Schneider, the US Magistrate Judge of the District Court of New Jersey is without merit and bad in law;

(c) there was no substantive evidence to associate the applicant with the

alleged offence. Even if the offence were committed (which is denied), it was committed in China and not in Malaysia. Further, the applicant had never set foot in the US; and

(d) the element of dual criminality has not been proved.

[34] In considering the affidavits filed by the applicant before the sessions court, the learned sessions court judge in her judgment said the applicant had not raised any substantial grounds to satisfy the court to believe in the existence of the circumstances in sub-paras (i)–(v) of s 20(1)(d) of the Extradition Act 1992. In her well written judgment, the learned sessions court judge said as follows:

> [40] Mahkamah telah meneliti hujahan kedua-dua pihak, fakta serta keterangan afidavit dan dokumen-dokumen yang dieksibitkan. Mahkamah mendapati kandungan Afidavit Balasan Responden dan Afidavit Balasan Responden II tidak membangkitkan sebarang pembelaan yang boleh dikemukakan menurut Seksyen 20(1)(d)(ii), 20(1)(d)(iii), 20(1)(d)(iv), 20(1)(d)(v) dan 20(1)(e) di bawah Akta Ekstradisi.

The learned sessions court judge also added that the averments were bare assertions without condescending to the relevant material facts.

[35] I am satisfied that the learned sessions court judge had properly considered the affidavits filed by the applicant in finding that the applicant had not brought himself within any of the circumstances under s 20(1)(d) of the Extradition Act 1992. Similarly, in the present application too, the applicant had not avail himself of the same. In the circumstances, I find that the applicant has not satisfied the court to believe in the existence of the circumstances in sub-paras (i)–(v) of s 20(1)(d) of the Extradition Act 1992.

CONCLUSION

[36] In the circumstances, I find that there is no impropriety in the grant of the warrant for committal by the learned sessions court judge. I hereby dismiss the applicant's application for a writ of habeas corpus and uphold the warrant for committal granted by the sessions court to detain the applicant pending the issuance of the order by the Minister for his surrender.

Application dismissed.

Reported by Dzulqarnain Ab Fatar